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Supreme Court, U. S.
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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DONOVAN WESLEY McGEE,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

Edgar Paul Boyko, Esq.
Robert John Buckalew, Esq. Of Counsel
Bruce Failey Sherman, Jr., Esq. Of Counsel
BOYKO & DAVIS
510 L Street, Suite 105
Anchorage, Alaska 99501
(907) 272-5464
Attorneys for Petitioner

Ken Wray's Print Shop, 323 East Fireweed, Anchorage, Alaska 99503 907-276-4535

QUESTION PRESENTED

Whether the Alaska Supreme Court's reliance upon a theory to uphold the validity of a warrantless seizure which was not presented to the trial court unfairly deprived Petitioner of an adequate opportunity to litigate the validity of the seizure and therefore constituted a denial of Petitioner's right to due process.

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No._____

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DONOVAN WESLEY McGEE,

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v.

STATE OF ALASKA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

Petitioner, Donovan Wesley McGee, respectfully prays that a writ of certiorari issue to review the judgment of the Alaska Supreme Court entered in the above-entitled case on July 25, 1980.

OPINION BELOW

The opinion of the Alaska Supreme Court, affirming the petitioner's conviction, is reported in *McGee* v. *State,* 614 P.2d 800 (Alaska 1980), and is printed in Appendix A.

JURISDICTION

The judgment of the Alaska Supreme Court was entered on July 25, 1980. A timely petition for rehearing, printed in Appendix B, was filed with the Court on August 18, 1980, and was denied without opinion on September 16, 1980. The order of the Alaska Supreme Court which was issued on September 16, 1980 and affirmed Petitioner's conviction, is printed in Appendix B. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3).

AMENDMENT 4

[Unreasonable searches and seizures.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 14

Section 1. [Citizenship—Due process of law—Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On July 6, 1977, at approximately 8:00 p.m., Mark Goodson was driving an Alyeska truck along Richardson Highway in a northerly direction. He was accompanied by Ricky McFarlin. They were returning from the garbage dump and were on their way back to Pump Station 10. A few miles north of Isabel Pass, a black Ford pickup pulled alongside them [Tr. 394]. The passenger shouted to the men and asked them who they worked for [Tr. 395]. When Goodson told them they worked for "ACV" the Ford pickup accelerated and began weaving back and forth in front of the Alyeska truck, eventually forcing Goodson to pull over to the side of the road [Tr. 397]. The two men in the Ford pickup disembarked from their truck, approached the Alyeska truck and forced Goodson and McFarlin to climb out [Tr. 393]. The two men then forced Goodson and McFarlin to climb into the back of the Ford pickup by threatening them and waving guns in their faces. Their assailants accused Goodson and McFarlin of being "scab laborers" [Tr 398]. Goodson and McFarlin eventually convinced their assailants to release them and began walking quickly towards Glennallen [Tr. 400].

A few seconds later, Goodson and McFarlin heard gunshots. As they turned around, they saw the man who had been driving the Ford pickup shoot at the Alyeska truck [Tr. 400]. Goodson and McFarlin were immediately able to hitch-hike a ride into the Alyeska pipeline camp at Glennallen. They reported the incident to Officer Ingalls and to a security guard [Tr. 401]. After giving conflicting descriptions of their assailants, and noting that one of them carried a chromed .45 caliber handgun, McFarlin stated that he believed the license plate of the black Ford contained three "2"s. A vehicle registration check yielded the information that the Petitioner

Donovan McGee owned a black Ford pickup with Alaska license number 2223AG. With this information, Troopers Cole, Sagraves, and Stuart drove to the Paxton Lodge area to question McGee on July 8, 1977 [Tr. 302].

After locating McGee in the Paxton Lodge, Trooper Cole asked to search McGee's truck. Under the belief that no search warrant was necessary to search the truck, McGee allowed them to inspect it [Tr. 347-48]. Cole then asked McGee whether he owned any firearms, specifically a chrome or nickel .45 automatic. McGee answered that he owned several firearms, including a .45, but that it was not chrome or nickel plated [Tr. 344-45]. Lacking a search warrant, Trooper Ronald Cole told McGee that he would like to see the gun. Under the impression that the Troopers needed no search warrant, McGee drove to his residence with the Troopers [Tr. 348]. Once there, McGee proceeded to the back of the trailer where he and his wife resided, and brought out a "blued" .45 automatic gun and some ammunition. After examining the gun, Cole informed McGee that he was taking the gun and the ammunition [Tr. 315-16, 351]. McGee, still confused as to his rights, asked the Troopers whether there was anything he could do to prevent them from taking the gun [Tr. 318, 361, 556]. When the Troopers responded either that they could get a warrant [Tr. 364], or that McGee could get a lawyer [Tr. 318, 364], McGee inferred from this answer that he had no choice but to allow the gun to be seized [Tr. 316].

Later that day, suspecting that McGee was implicated in the incident, Trooper Ingalls sent for Alyeska security badges to be used in a photographic lineup. McFarlin and Goodson were asked to report to the security building at Glennallen camp early in the evening of July 8, 1977, in order to view the lineup [Tr. 440-42, 788]. They were forced to wait for more than

three hours, however, for the arrival of McGee's picture from Fairbanks [Tr. 685]. When it finally arrived, McGee's photograph was placed in a display of thirty-two security badges arranged in two long rows. Goodson, who was asked to view the lineup first, could not identify any of the pictures. As he left the room where the lineup was conducted, Goodson expressed the fact to McFarlin, with a shrug of his shoulders, that he had failed to make an identification [Tr. 793]. McFarlin, inferring from Goodson's gesture that he had "not done too good a job," entered the room to view the photographs. [Tr. 793]. McFarlin immediately pointed to McGee's picture.

Before trial, Petitioner moved to suppress the ballistics evidence on the grounds that it was illegally seized [Tr. 302, 558]. The judge continued the hearing, reserving judgment until after the commencement of the jury trial [Tr. 369, 547], eventually denying the motion by resolving a conflict in the testimony in favor of the State and finding that the Petitioner had consented to the seizure [Tr. 580].

At trial, McGee denied any complicity in the incidents of July 6, 1977, at mile 206 Richardson Highway. McGee's testimony regarding his actions on the sixth of July revealed that he could not have been involved in the assault. McGee related how he awoke from a nap at approximately 5:30 p.m. He then walked over to Paxton Lodge to join his wife and to wait for Warren Smith. McGee and Smith planned to drive to Glennallen to talk to people on the picket line. McGee testified that he and Smith left for Glennallen from Paxton Lodge at approximately 7:30 p.m., and arrived at Glennallen at around 9:00 p.m. They stayed at Glennallen until approximately 2:30 a.m., at which time they returned to the Paxton Lodge [Tr. 1457-64]. Moreover, McGee testified that he and Smith drove

Smith's truck to Glennallen because McGee's truck, the black Ford with license number 2223AG, had been up on blocks since July 3 because of an oil leak [Tr 1447]. Warren Smith corroborated totally McGee's testimony in regard to McGee's actions on July 6, 1977 [Tr. 1392-1410].

The Alaska Supreme Court, in reviewing the record, found that a seizure did occur and that the Petitioner did not consent to it. *McGee* v. *State,* 614 P.2d 800, 805 (Alaska, 1980). The Court, however, upheld the seizure on the basis that the evidence seized was in plain view, which permitted the officers to seize it without a warrant. The plain view exception to the warrant requirement for a seizure was a theory which was neither advanced nor argued by the State at the suppression hearing nor was it apparently relied upon by the trial court in its decision to deny petitioner's Motion to Suppress Evidence. *McGee* v. *State, supra,* footnote 10 at 805-806. The "plain view" justification for the warrantless seizure was first advanced by the State in its brief to the Alaska Supreme Court. (Brief of Appellee to the Alaska Supreme Court at 33-34).

MANNER IN WHICH THE FEDERAL QUESTIONS WERE PRESENTED

Before trial, Petitioner moved to suppress evidence derived from the seizure of a firearm on the grounds that the seizure violated the Fourth Amendment to the United States Constitution. The exclusionary rule is made applicable to the States by the Due Process Clause of the Fourteenth Amendment. *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

On Appeal to the Alaska Supreme Court, the State of Alaska sought to justify the seizure of the firearm under the

plain view doctrine. Its theory before the trial court had been consent.

Petitioner's Reply Brief to the Alaska Supreme Court challenged the State's reliance upon the plain view doctrine. Petitioner's Reply Brief pp. 12-17. It was argued there, as in this Writ, that the reliance upon a new theory on appeal to uphold a warrantless seizure violated Petitioner's right to secure relief guaranteed by the Fourth Amendment of the United States Constitution.

REASONS FOR GRANTING THE WRIT

A. The Alaska Supreme Court's Decision Conflicts In Principle With Decisions of this Court

This Court has recognized that it is unfair to a criminal defendant for the government to inject a new theory into a case on appeal to uphold the validity of an arrest. This unfairness is also present when a new theory is relied upon on appeal to uphold a warrantless seizure.

In *Giordenello* v. *United States,* 357 U.S. 480 (1958), the Court considered whether affidavits of a complaining officer submitted to support the issuance of an arrest warrant set forth a sufficient basis to establish a finding of probable cause. On appeal to this Court, the government argued that the arrest in question was justified without a warrant. The Court refused to uphold the arrest on this theory:

> We do not think that these belated contentions are open to the government and this Court accordingly has no occasion to consider their soundness. To permit the government to inject its new theory into the case at this stage would unfairly deprive the Petitioner of adequate opportunity to respond. This is so because in the District Court

> petitioner, being entitled to assume that the warrant constituted the only purported justification for the arrest, had no reason to cross-examine Finley or to adduce evidence of his own or to rebut the contentions that the government makes here for the first time.
> 357 U.S. at 488.

This Court recognized that it was unfair to the Petitioner in *Giordenello* to permit the government to rely on testimony given by the agent at the suppression hearing to establish probable cause to arrest without a warrant. Since the government had sought to uphold the validity of the search on the basis of the warrant, the Petitioner had not developed a factual record as to the validity of a warrantless arrest.

A similar chain of events has transpired here. At the suppression hearing the issue litigated was the issue of consent. Petitioner did not develop the facts as to the applicability on the plain view doctrine since that doctrine was not in issue.

This Court has recognized that a search conducted without a warrant issued upon probable cause is *per se* unreasonable subject to a few specifically established and well delineated exceptions. *Katz* v. *United States,* 389 U.S. 347 (1967). It is equally well established that in a warrantless search situation the burden of proof rests with the government to establish that the search is encompassed by a recognized exception.

The State of Alaska claimed before the trial court that Petitioner had consented to the seizure of the firearm. On appeal, the Alaska Supreme Court held that Petitioner had not intended to give up custody of the firearm. The seizure was affirmed on the basis of the plain view doctrine. The Court recognzed it was affirming the seizure on a basis not fully presented to the trial court:

> Although the plain view justification was mentioned at the suppression hearing it was never argued to the court. McGee maintains that the state is therefore precluded from raising this theory on appeal. We disagree. Our previous opinions establish that a correct ruling of law by a trial court may be affirmed, regardless of the reasons advanced, if there exist independent grounds which, as a matter of law, support the trial court's conclusion. [Citations omitted] *McGee, supra* at 805-06 n.10.

The Alaska Supreme Court fundamentally misconceived the issue of a warrantless seizure by regarding it as an issue of law.

The application of the plain view doctrine is based upon the facts of each case. A plurality of this Court has recognized three basic requirements of a valid plain view seizure of evidence: (1) the initial intrusion which afforded the view must have been lawful; (2) the discovery of the evidence must have been inadvertent; and (3) the incriminating nature of the evidence must have been immediately apparent. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 466 (1971).

It is also recognized that a valid plain view seizure also must be based upon probable cause to believe that the item seized is a fruit, instrumentality or evidence of a crime. A probable cause determination is inextricably linked to the facts. As stated in a leading case defining probable cause:

> In dealing with probable cause, howevever, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved ... Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably

> trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that "an offense has been or is being committed." [Citations omitted] *Brinegar* v. *United States*, 338 U.S. 160, 175-6 (1949).

The question of the application of the plain view doctrine was therefore not a question of law, but is a question of fact to be resolved by the trial court at an evidentiary hearing. If the Alaska Supreme Court's decision is not reversed the burden of proof in a warrantless seizure situation will be shifted to the Defendant. Notwithstanding which exception to the warrant requirement or other theory the State selects to uphold the validity of a warrantless seizure it will be incumbent upon a Defendant to disprove all exceptions. This would be necessary to avoid the possibility that the State would rely on a new theory on appeal for which the Defendant had failed to develop an adequate record.

The Alaska Supreme Court also erred in assuming that Petitioner was not prejudiced by its reliance on the plain view doctrine. This assumption was based upon its view that Petitioner did not dispute the essential facts relied upon to apply the plain view doctrine. Petitioner did not dispute facts applicable to the plain view doctrine simply because it was not an issue before the trial court. Petitioner can not be faulted for not presenting evidence through cross-examination, or some other means, to rebut the factual basis of the plain view doctrine.

Petitioner maintains that, pursuant to the authority of *Giordenello* and *Coolidge* a reversal of his conviction is required.

B. The Alaska Supreme Court's Decision Conflicts In Principle With Decisions

Of Other States' Supreme Courts

The Supreme Courts of other States have refused to permit the prosecution to rely upon alternative theories on appeal to justify a warrantless search which were not presented to the trial court. A typical statement is found in *People* v. *Superior Court*,496 P.2d 1205, 1214 (California 1972):

> Furthermore, the People's new theory comes too late: neither at the suppression hearing nor the preliminary examination did the People support the search on this rationale. "To permit the People to inject this new theory into the case would deprive the [Defendant] of a fair opportunity to present an adequate record in response. The [Defendant] was entitled to assume that the justification for the search was presented before the Magistrate. He had no opportunity to mount a legal attack on a theory advanced for the first time before this Court, nor to present evidence on cross-examination to rebut the factual basis underlying the additional justification for the search." [Citations omitted]

The same principle was espoused by the Oregon Supreme Court in *State* v. *Hickman*, 540 P.2d 1406 (Oregon 1975) where it reversed an Appellate Court's decision to remand a case to the trial court for findings on whether a warrantless search was consented to by the Defendant. The reversal was ordered because the issue of consent was not raised in the trial court:

> Appellate Courts are limited in their scope of review. Generally, on appeal, the case, civil or criminal, should be heard on the same theory upon which it was presented in the court below ... Further, a question not raised and presented in the trial court will not be considered on appeal unless upon an examination of the entire record the

> Court can find that the error is manifest and that the ends of justice will not otherwise be satisfied. Since the State did not rely upon "consent" as a basis to justify the warrantless search at the trial court level or on appeal, the decision of the Court of Appeals is reversed. [Citations omitted] 540 P.2d at 1407.

The conflicts in the Appellate Courts of the States justify the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Alaska.

Respectfully submitted,

EDGAR PAUL BOYKO,
ROBERT JOHN BUCKALEW, OF COUNSEL
BRUCE FAILEY SHERMAN JR., OF COUNSEL
BOYKO & DAVIS
Attorneys for Petitioner

APPENDIX A

THE SUPREME COURT
OF THE STATE OF ALASKA

DONOVAN WESLEY McGEE,	)	
Appellant,	)	File No. 3904
v.	)	OPINION
STATE OF ALASKA,	)	(No. 2136 - July 25, 1980)
Appellee.	)	

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Jay Hodges, Judge.

Appearances: Mitchel J. Schapira, Edgar Paul Boyko & Associates, Anchorage, for Appellant. James P. Doogan, Assistant District Attorney, Harry L. Davis, District Attorney, Fairbanks, and Avrum M. Gross, Attorney General, Juneau, for Appellee.

Before: Rabinowitz, Chief Justice, Connor, Boochever, Burke, and Matthews, Justices.

CONNOR, Justice.

Donovan McGee appeals from his convictions for assault with a dangerous weapon (AS 11.15.220) and malicious destruction of property (AS 11.20.515). The events leading to his convictions are as follows.

On July 6, 1977, at approximately 5:30 p.m., Mark Goodson was driving an Alyeska truck in a northerly direction along the Richardson Highway. He was accompanied by Ricky McFarlin. A few miles north of Isabel Pass at approximately mile 201 of the Richardson Highway, a black Ford pickup pulled alongside of them. The person riding in the passenger seat of the pickup shouted to Goodson and McFarlin, asking them who they worked for. When Goodson replied that they worked for "ACV" the black pickup pulled in front of the Alyeska truck and began to slow down, weaving back and forth in order to prevent Goodson from passing. At one point, Goodson attempted to pass the black pickup but thought better of it when the driver brandished a pistol and shouted "pass me and you're dead."

After about four miles, Goodson was forced to pull off to the side of the road. The two men in the black pickup then disembarked from their truck, approached the Alyeska vehicle and forced Goodson and McFarlin to climb out. The two men, each of whom had a gun,[1] accused Goodson and McFarlin of being "scab laborers" and forced them at gunpoint to climb into the back of the black pickup. According to Goodson, one of the men said "We're going to kill you" and "This is a one way ride for you guys."

After being subjected to a verbal tirade by the two men, Goodson and McFarlin eventually convinced their captors to release them. As Goodson and McFarlin were walking away from the scene of the assault, however, they heard gunshots. As they turned around they saw the

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1. According to McFarlin, the driver had a .45 caliber or a 9 mm automatic pistol with a blue steel barrel, and the passenger had a similar weapon with a chrome or nickel finish.

man who had been driving the black pickup shoot at the Alyeska truck.

Goodson and McFarlin were able to hitchhike to the Alyeska pipeline camp at Glennallen and immediately reported the incident to Officer Ingalls of the Alaska State Troopers. McFarlin described the black pickup to Trooper Ingalls in some detail[2] and stated that he thought the license plate number contained three two's. After taking statements from Goodson and McFarlin, Trooper Ingalls then visited the scene of the alleged crime where he recovered five expended .45 caliber cartridges. A vehicle registration check revealed that the appellant owned a black Ford pickup with Alaska license plate number 2223AG. Acting on this information, Troopers Cole, Sagraves and Stuart drove to Paxson Lodge area on July 8, 1977, to question the appellant.

Having first observed appellant's black Ford pickup, Trooper Cole then located the appellant at the restaurant of the Paxson Lodge and requested him to step outside to talk. Once in the parking lot, but before questioning began,[3] Trooper Cole notified appellant that he was a suspect in a crime, and that he and his vehicle matched the descriptions that Trooper Cole had been given and advised him of his Miranda rights. Appellant stated that he understood his rights. Trooper Cole then asked appellant if he owned a .45 automatic pistol. Appellant replied that he did and Trooper Cole asked if he could

2. McFarlin described the truck to Officer Ingalls as a 1976 or 1977 black Ford pickup equipped with four wheel drive, mag wheels with white spokes, a camper shell and a CB antenna on top of the cab.

3. Appellant testified that Trooper Cole told him he was a suspect in a crime, but did not advise him of his Miranda rights until after asking appellant whether he owned a gun

see it. Appellant agreed to show the troopers the weapon and the scene then shifted to appellant's trailer, about 100 yards distant, where the gun was located. Once there, appellant produced a "blued" .45 automatic pistol and some ammunition. After examining the gun, Trooper Cole informed the appellant that he was taking the weapon and the ammunition.

Later that day Trooper Ingalls received 32 Alyeska identification badges which he had requested from Alyeska. These photographs were arranged in two long rows and used in a photographic lineup which was viewed by Goodson and McFarlin. Goodson viewed the lineup first but could not identify any of the pictures. McFarlin then viewed the pictures and identified McGee as the person who drove the black pickup truck.

At trial, appellant denied any complicity in the assault upon Goodson and McFarlin. Appellant testified that at the approximate time of the incident he was at Paxson Lodge with his wife and friends and that he did not leave Paxson until approximately 7:30 p.m., well after the incident allegedly took place.

Appellant appeals his conviction on several grounds. We will deal with each of these contentions in the order in which they were raised.

I

Appellant's first assignment of error is that, in addition to instructions on the main charge of assault with a dangerous weapon, the trial court, sua sponte, should have instructed the jury on the lesser included offenses of careless use of firearms and simple assault. Appellant acknowledges that, in view of his failure to request such

instructions at trial or object to their omission, his claim is cognizable, if at all, only under the doctrine of plain error.[4]

It is not every claim that deserves review under the plain error rule. We have previously noted with regard to the admissibility of evidence:

> "Where the error is not obvious or immediately apparent we should abstain from a full-scale examination of it, for the basic rule is that failure to object to offered evidence waives the objection."

Gilbert v. State, 598 P.2d 87, 92 (Alaska 1979). In Gilbert, as a method of inquiry, we proceeded to consider whether appellant had presented a tenable claim. We concluded that he had not done so and, therefore, held that there was no plain error. We reach a similar result here.

At trial, appellant denied any complicity in the crime and presented only exculpatory evidence. There was no evidence adduced at trial which tended to show that a lesser crime had been committed nor did the state fail to prove all elements of the crime charged. Accordingly, the appellant could only have been found guilty of the crime charged or not guilty at all.[5] Under the circumstances we conclude that the claimed error was not "obviously prejudicial." Gilbert v. State, 598 P.2d at 92. Therefore, the trial court did not commit plain error in failing to instruct, sua sponte, on lesser included offenses.

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4. Criminal Rule 47(b) states:

"Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

5. We indicated in Christie v. State, 580 P.2d 310, 317, n.22 (Alaska 1978), that in such situations an instruction on lesser included offenses need not be given.

II

Appellant next contends that the photographic identification procedure was so impermissibily suggestive and unreliable as to violate due process of law. Stovall v. Denoo, 388 U.S. 293, 302, 18 L.Ed.2d 1199, 1206 (1967); Noble v. State, 552 P.2d 142, 146 (Alaska 1976). We need not reach this issue because we are convinced that appellant waived the argument at trial.[6] Appellant, however, makes the related claim that the trial court erred in failing to give appellant's requested insruction cautioning the jury that the identification procedure may be suggestive. Since this contention was properly preserved and was not waived at trial we consider it now.

Appellant's proposed instruction would have advised the jury of the possibly suggestive nature of lineups and would have instructed the jury to disregard evidence adduced as a result of a suggestive procedure. The instruction actually given merely advised the jury in general terms on the credibility of witnesses.

We confronted a similar problem in Buchanan v. State, opn. on rehearing, 561 P.2d 1197, 1207 (Alaska 1977). In that case, appellant requested an identification instruction which went beyond the trial court's instruction by focusing attention on possible inadequacies of a witness's identification. Instead of giving appellant's instruction, the court gave a general instruction that the state had the burden of proving accurate identification beyond a reasonable doubt. Without passing upon the correctness of appellant's proposed instruction, we held that the trial court committed no error. In reaching our conclusion we noted that whether a particular instruction

6. The record reveals that appellant failed to make timely objection to the introduction of evidence concerning the lineup. Appellant appears to have made a tactical decision in this regard, preferring to argue a tainted lineup to the jury rather than attempting to suppress the lineup entirely.

should be given rests in the discretion of the trial court and that the instruction which the court gave embodied correct statements of the controlling law. Id. We also noted that all of the factors contained in Buchanan's proposed instruction were referred to by appellant's counsel in closing argument. Id. at n.28.

In the case at bar, the court's instruction accurately advised the jury to consider "any matter that has a tendency or reason to prove or disprove the truthfulness of [a witness'] testimony." The court then listed several factors which might affect a witness' credibility including, but not limited to, the reasonableness of his testimony in light of all the evidence in the case.[7] We think this instruction was entirely adequate. Moreover, as in Buchanan, appellant's counsel discussed at some length in final argument the suggestibility of the lineup procedure. In these circumstances, we think the trial court's failure to give appellant's proposed instruction did not constitute error.

III

Appellant's next contention is that the trial court erred in failing to suppress certain ballistics evidence claimed to have been the result of an illegal search and seizure. Before trial, appellant moved to suppress this evidence but that motion was denied.

The claim arises from circumstances surrounding the visit of Troopers Cole, Sagraves and Stuart to Paxson Lodge on July 8, 1977. As previously recounted, Trooper Cole fully advised appellant of his Miranda rights and then asked appellant if

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7. In two recent cases, we approved almost identical instructions over claims that a more specific identification instruction should have been given. Dayton v. State, 598 P.2d 67, 68 (Alaska 1979); Huske v. Municipality of Anchorage, 585 P.2d 504 (Alaska 1978).

he owned a .45 automatic pistol. Appellant said that he did own such a weapon and proceeded to lead the troopers to it. Appellant handed the weapon to Officer Cole who, after examining it, informed appellant that he was taking the weapon along with the ammunition. Appellant now contends that he never voluntarily consented to either the viewing or the taking of the gun and the ammunition and that, therefore, the troopers actions must be considered an unreasonable search and seizure because those actions took place without a warrant and were not within a valid exception to the warrant requirement.

Both the Fourth Amendment to the federal constitution and its counterpart found in article I, section 14 of the Alaska constitution furnish guarantees against unreasonable searches and seizures. Those provisions are only operative, however, when there has in fact been either a "search" or a "seizure."[8] In Brown v. State, 372 P.2d 785, 790 (Alaska 1962), we defined "search" in the following manner:

> "[T] he term [search] implies some exploratory investigation or an invasion or quest, a looking for or seeking out. The quest may be secret, intrusive or accomplished by force, either actual or constructive, much or little. A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. While it has been said that ordinarily searching is a function of sight, it is generally held that

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8. As Professor Amsterdam notes, the words "searches and seizures" are terms of limitations. Law enforcement practices are not required to be reasonable unless they are either "searches" or "seizures." Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 356 (1974).

> the mere looking at that which is open to view is not a "search.' " (quoting People v. West, 300 P.2d 729, 733 (Cal. App. 1956)).

We do not believe that the trooper's conduct in this case constituted a search within the meaning of Brown. The facts show that appellant himself retrieved the weapon and presented it to Trooper Cole. There is no evidence of duress or coercion on the part of the troopers. Consequently, no "exploratory investigation" on the part of the troopers was required, nor was one carried out. Had the facts been otherwise — for example, had appellant told the troopers to "find the weapon if you can" — a search would have occurred and we would then be required to examine whether consent to search was freely given. Under the circumstances of this case, however, that issue is not raised.

A more difficult question is whether the trooper's conduct constituted an unreasonable seizure. In Brown v. State, 372 P.2d at 790, we defined a seizure as "a forcible dispossession of the owner and . . . not a voluntary surrender." quoting People v. West, 300 P.2d 729, 733 (Cal. App. 1956). In the present case, although appellant voluntarily surrendered the weapon to Trooper Cole for the purpose of immediate inspection, we are not convinced that he thereby intended to give up custody of the weapon for other purposes. This conviction is strengthened by the fact that Trooper Cole never asked appellant permission to take the weapon. Moreover, in response to Trooper Cole's statement that he was taking the weapon, appellant testified that he said, "There's not much I can do about it, is there?" and, "I don't appreciate the fact that you're taking my guns." These are not the statements of a man in-

tent upon giving up custody of his gun. We, therefore, find that a seizure did occur.[9]

The fact that a seizure occurred does not settle the matter, however, for once the gun was presented to the troopers for viewing they were entitled to seize it as evidence in plain view.[10] As the United States Supreme Court stated in Harris v. United States, 390 U.S. 234, 236, 19 L.Ed.2d 1067, 1069 (1968):

> "It has long been settled that objects falling in the plain view of an officer who has a right to be in a position to have that view are subject to

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9. The foregoing facts are distinguishable from Sleziak v. State 454 P.2d 252 (Alaska 1969), where we found that no seizure had occurred. In Sleziak, the evidence of a voluntary surrender of possession was much clearer. In that case, Sleziak was requested to appear at Alaska State Trooper Headquarters in Anchorage for questioning concerning a recent homicide. After first being informed of his Miranda rights and indicating a willingness to talk, Sleziak admitted ownership of a .32 revolver. Sleziak was then asked, on three separate occasions, whether he objected to the police testing the weapon. On each occasion Sleziak answered that he had no objection. When state troopers were dispatched to Sleziak's residence to retrieve the weapon, they were met by Sleziak's roommates who had apparently been apprised of the situation and who offered no resistance. The roommates led the troopers to the weapon and voluntarily relinquished possession.

10. Although the plain view justification was mentioned at the suppression hearing, it was never argued to the court. McGee maintains that the state is therefore precluded from raising this theory on appeal. We disagree. Our previous opinions establish that a correct ruling of law by a trial court may be affirmed, regardless of the reasons advanced, if there exist independent grounds which, as a matter of law, support the trial court's conclusion. Pistro v. State, 590 P.2d 884, 888 n.13 (Alaska 1979); Stordahl v. Government Employees Ins. Co., 564 P.2d 63, 67 n.16 (Alaska 1977).
We are unpersuaded by McGee's contention that permitting argument of the plain view theory on appeal is unfair because he had no opportunity to develop an adequate record on that theory at trial. The essential facts necessary to our conclusion that the police properly seized the weapon as evidence in plain view were not disputed by McGee. We, therefore, see no basis for McGee's claim of prejudice.

seizure and may be introduced in evidence." 11/

The Fourth Amendment, of course, requires that before seizing an item in plain view, the police must have probable cause to believe that the item seized is a fruit, instrumentality or evidence of a crime. Here appellant asserts that the troopers had no probable cause to believe that the gun which appellant showed them was the same gun used against Goodsen and McFarlin.

Appellant, however, misapprehends the requirements of probable cause. As the Supreme Court stated in Brinegar v. United States, 338 U.S. 160, 175, 93 L.Ed 1879, 1890 (1949), "[i] n dealing with probable cause, . . . as the very name implies, we deal with probabilities." See also, Spinelli v. United States, 394 U.S. 410, 419, 21 L.Ed.2d 637, 645 (1969). It has been said that in a search and seizure context probable cause does not mean "more likely than not" or "by a preponderance of the evidence," rather, the words connote something more akin to "reasonable cause." United States v. Melvin, 596 F.2d 492,495 (1st Cir. 1979), cert. denied, ____ U.S. ____, 62 L.Ed.2d 48 (1979). Accord Reeves v. State, 599 P.2d 727, 739 (Alaska 1979).

In Melvin, a search warrant was issued for defendant's home on the basis of facts indicating that the defendant owned a white Cadillac, a relatively unusual car, and that a man fitting the general description of the defendant had been observed driving away from the scene of an explosion in a white Cadillac shortly before its occurrence. The court held that, on the basis of these facts, it was reasonable to believe that materials used for the construction of a bomb would be found

11. Accord, Klockenbrink v. State, 472 P.2d 958, 961 (Alaska 1970); Pope v. State, 478 P.2d 801, 805 (Alaska 1970).

in the defendant's home and that the warrant was, therefore, proper.

The present case bears certain similarities to Melvin. The police had a fairly detailed description of the vehicle used in the crime, including a partial license plate number. The vehicle, a black Ford pickup with mag wheels, was described as the only one of its kind in the vicinity and was found in front of McGee's home. Moreover, McGee, the owner of the vehicle, fitted the general description of the suspect. In these circumstances we think it was reasonable for the officers to infer that McGee's gun was the weapon used to perpetrate the crime. Where there is probable cause that a crime has been committed and also probable that a particular person committed it, we think a lesser degree of probability will suffice to justify temporary seizure of a weapon to determine if it was involved in the crime. See, W. LaFave, Search and Seizure, § 3.2 at 492 (1978). Viewing the totality of the circumstances we conclude that the seizure of appellant's gun was not unreasonable.[12]

IV

Appellant next contends that the trial court abused its discretion by qualifying John Sauve as an expert on

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12. In Reeves v. State, 599 P.2d 727, 738 (Alaska 1979), we recognized three requirements for the plain view seizure of evidence: (1) the initial intrusion which afforded the view must have been lawful; (2) the discovery of the evidence must have been inadvertent, and (3) the incriminating nature of the evidence must have been immediately apparent. We recognize that the inadvertence requirement is lacking in this case, however, in Reeves, as well as other cases applying the plain view doctrine, the seizure in question was preceded by a search. We think that in non-search situations such as the present, the requirement that discovery be inadvertent is inapplicabale. The inadvertent discovery requirement assures that police will not intentionally expand the permissible scope of an otherwise lawful search. Where there is no search, there is a fortiori, no danger that the police will exceed their permissible limits.

ballistics.[13] Appellant contends that the type of equipment used by Sauve, the procedures employed, and Sauve's admission that he did not perform those tests normally expected of an expert in the field, were all relevant to Sauve's qualifications as an expert. We disagree.

Sauve's qualifications to testify as an expert depend on his experience and training, not upon what he might say once qualified by the court. As to this, the record reveals that Sauve was amply qualified to be considered an expert in the field. Once qualified as an expert, any deficiencies in his testimony would go to the weight to be accorded that testimony, not its admissibility.

V

Appellant's fifth contention is that the trial court abused its discretion in two respects during the voir dire of prospective jurors. First, appellant alleges that the court erred in refusing to excuse juror Pickett who was challenged for cause on the basis of an admitted hearing problem. Appellant later used a peremptory challenge to excuse Pickett.

In City of Kotzebue v. Ipalook, 462, P.2d 75, 77 (Alaska 1969), we said: "Trial court discretion as to challenges for case is interfered with only in exceptional circumstances and to prevent miscarriages of justice." See also, Mitchell v. Knight, 394 P.2d 892, 897 (Alaska 1964). The present case involves no such exceptional circumstances. Before ruling on the challenge the court questioned juror Pickett as to the extent of his problem. Pickett stated that up to that point he had no trouble hearing the proceedings. The court then stated:

"I'm not going to excuse him on this basis at

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13. It should be noted that Sauve was not qualified as an expert on ballistics, but rather as an expert on tool mark identification.

> this time. We'll select two alternates and if — after the trial gets into the proceeding, if he has a problem he can be excused. But apparently he hasn't missed anything so far, and he's willing to serve."

We are satisfied that the trial judge did not abuse his discretion in failing to excuse juror Pickett for cause. Moreover, appellant did not exhaust his peremptory challenges. City of Kotzebue v. Ipalook 462 P.2d at 77.

At his second allegation of error on voir dire appellant contends that the court substantially inhibited or impaired his ability to question prospective jurors by reserving its ruling on the admissibility of certain ballistics evidence until after trial had begun. Appellant contends that since he did not know whether the ballistics evidence would be admissible, and did not want to raise matters before the jurors which he hoped to exclude from trial, he was unable to properly question prospective jurors concerning possible bias towards ballistics evidence.

The record in this case indicates that the court's decision to reserve its ruling on appellant's suppression motion was unavoidable. Through a series of delays, caused primarily by defense counsel's inability to attend the suppression hearing, appellant's motion could not be heard until the first day of trial. Since the jury panel was already waiting, the court ruled that the suppression hearing would have to be rescheduled so as not to interfere with the trial. The suppression hearing was therefore scheduled for the following day, after the jury had been empaneled. We think this was correct.

In Burleson v. State, 543 P.2d 1195, 1200 (Alaska 1975), we said:

> "Efficiency in the operation of the court

> system and the interest of the public in prompt disposition of criminal cases dictate that unnecessary delays be avoided."

Of course, as we said in Burleson, considerations of efficiency must give way where substantial rights of a defendant are concerned. Id. In the present case, however, we do not believe such rights were affected. Although appellant may have been inhibited from asking questions about ballisticsa evidence he nevertheless was able to and did question potential jurors about expert testimony in general. We think this was sufficient.

VI

Following trial and after the jury had returned its verdict, appellant moved for judgments of acquittal on both counts pursuant to Alaska Criminal Rule 29(a). Appellant alleged that the state had failed to present evidence that the crimes charged had been committed in the Fourth Judicial District. The trial judge denied both motions.

Significantly, appellant does not argue that there is any doubt as to where the crime occurred. Indeed, five witnesses testified that the crime occurred at approximately Mile 205 or 206 of the Richardson Highway. Rather, appellant contends that there was no evidence that this location was within the Fourth Judicial District.

We think appellant's argument is clearly without merit. Even assuming the correctness of his position, we are empowered to take judicial notice of the constitution and public laws of this state. Alaska Rules of Evidence 202(b); Alaska Civil Rule 43(a). Since the boundaries of the Fourth Judicial

District are clearly delineated by AS 22.10.010, we now take judicial notice of the fact that Mile 206 of the Richardson Highway is within that judicial district.

For the foregoing reasons the judgment and commitment entered by the superior court are affirmed.

AFFIRMED.

APPENDIX B

THE SUPREME COURT
OF THE STATE OF ALASKA

DONOVAN WESLEY McGEE,	)
	)
Appellant,	)
	)
v.	)
	)
STATE OF ALASKA,	)
	)
Appellee.	)

Supreme Court No. 3904
Superior Court No. 4FA-77-1672 Cr.

O R D E R

Before: Rabinowitz, Chief Justice, Connor, Burke and Matthews, Justices.

On consideration of the Petition for Rehearing filed August 18, 1980,

IT IS ORDERED:

The petition for rehearing is denied.

Entered by direction of the court at Anchorage, Alaska, on September 16, 1980.

CLERK OF THE SUPERIOR COURT

ROBERT D. BACON

ccs: Justices
Counsel

APPENDIX C

IV. THE FIREARM EVIDENCE WAS PROPERLY OBTAINED AND PRESENTED BY A COMPETENT WITNESS.

Defendant assigns as error the presentation at trial of evidence of similarity between tool marks (i.e. scratches) on a shell casing found at the scene and tool marks on a casing removed from the gun later presented to the police by defendant. Defendant urged suppression on the ground that police came into possession of the weapon unconstitutionally. The State asserts the admissibility of the evidence because the gun was properly seized without a warrrant in plain view, and with consent of the defendant.

A. The State May Urge Admissibility Of Evidence On Appeal On Grounds Not Reached By The Trial Court And On Grounds Not Even Argued In The Trial Court.

Defendant seeks to confine the State's response on the suppression issue to the question of consent. Defendant ignores a number of factors: First, the State argued grounds other than consent below. See State's Opposition to Motion To Suppress, [Tr. 570-574] filed November 2, 1977, and second, the trial court's ruling on only one of several grounds does not constitute a waiver or rejection of the other grounds. See Pistro v. State, Opin. No. 1799, February 16, 1979, p. 11 n.13. Third, the rule preventing the raising of new issues on appeal is designed to obviate the need for retrials, whereas defendant's contention here increases the likelihood of reversal and retrial. Lewis v. State, 565 P.2d, 846, 853-854 (Alaska 1977). Fourth,

the issue is the validity of the State's acquisition of evidence, different arguments in support do not constitute raising a new issue.

B. Defendant Waived Any Right To Suppression Of Evidence By Not Urging It Until Three Days Before Trial.

Defendant's attempts to suppress the gun and evidence derived therefrom came too late. As the record makes clear, the means by which the police obtained the evidence were known months before the omnibus hearing, yet defendant's attorney stated on record at the omnibus hearing that he had no search and seizure issues to raise. It was only after the laboratory examination of defendant's gun that defendant saw fit to object. The objection came only three days before trial.

Criminal Rule 12 is clear that motions to suppress must be brought by omnibus hearing. Failure to so move in timely fashion constitutes a waiver of any right to object, notwithstanding the constitutional dimension of issues raised. Criminal Rule 12(b) and (3). That fundamental rights may be waived by failure to timely assert them is clear from this court's decisions and those of other courts. See Smiloff v. State, 579 P.2d 28, 37-38 (Alaska 1978); State v. Selman, 406.

APPENDIX D

Significantly, the instruction requested by McGee could be considered an alternative to the Telfaire instruction. It provided a basic, cautionary instruction by which the jury could consider the photographic lineup procedure and the subsequent identifications to determine whether they were suggestive and therefore defective. The trial court's failure to give the instruction is unjustifiable. It cannot be said to be an incorrect statement of the law. It certainly would not lead to jury confusion. Nonetheless, the court denied the instruction, apparently upon the ground that defendant has waived due process argument relating to the admissibility of the identification [Tr. 1521-33].

As such, the ground for the court's ruling would seem improper. Even if McGee had inadvertently waived any right to object to the admissibility of the identification, he still had a right to attack the weight and credibility to be given the identification by the jury. The instruction would have done nothing more than caution the jury to review the procedure employed in the photographic lineup and to disregard the identification if it found the lineup was unduly suggestive.

III

THE TRIAL COURT ERRED IN REFUSING TO EXCLUDE EVIDENCE OF THE FIREARM

In the trial court, the prosecution asserted that the firearm seized from McGee could be introduced at trial because he had "consented" to its seizure. However, on appeal, the prosecution has also attempted to assert a new ground for affirming the trial court's decision to admit the weapon into evidence. Thus, the state has attempted to rely upon the "plain view" doctrine to uphold the admissibility of the firearm. However, the case law in Alaska and elsewhere makes it clear that the

prosecution cannot rely upon a ground not asserted or argued before the trial court to affirm the admissibility of evidence. Moreover, even if the "plain view" doctrine could be asserted, it is evident that there was no probable cause for seizing the weapon. Therefore the "plain view" doctrine is not applicable. Finally, the alleged "consent" of McGee at best involved the acquiescence to the assertion of authority which vitiated his consent.

A. The State May Not Urge A New Ground On Appeal To Sustain The Admissibility of Evidence

McGee has sought to confine the prosecution's arguments on appeal to the issues argued before the trial court. The reasons for this position are twofold: (1) a defendant is entitled to notice of the state's position; and (2) a defendant is entitled to probe the sufficiency of the state's showing in the trial court through examination of witnesses and production of evidence. If the prosecution could simply assert a new ground on appeal, this would obviate the function of any evidentiary hearings held by the trial court. It would deprive a defendant of the opportunity to probe the prosecution's showing through argument and cross-examination. Moreover, the appellate court will rarely have a full record upon which to base its ruling.

Indeed the State's reliance upon Pistro v. State, Opin. No. 1799 (February 16, 1979), is totally unavailing. In that decision, the court merely held that where the issue is one of law, the trial court's ruling can be upheld if there is another ground for affirmance.[2] On the other hand, matters of fact raised for the first time on appeal will not be considered.[3] The question

2. See e.g. Stordahl v. Government Employees Insurance Company, 564 P.2d 63, 67 n.16 (Alaska 1977).

3. Lewis v. State, 565 P.2d 846 (Alaska 1977); King v. Petroleum Service Corp., 536 P.2d 116, 121 n.9 (Alaska 1975).

of the application of the "plain view" doctrine is not a question of law, but rather, is a question of fact to be determined by the trial court after an evidentiary hearing. If the question were one of law, the need for an evidentiary hearing would be obviated.

Thus in Lewis v. State, 565 P.2d 846 (Alaska 1977), the court refused to consider issues not raised in the lower court:

> Pursuant to our usual practice, we will not address on appeal issues not presented to the trial court. [Citation omitted] The purpose of this rule is served only if the issue was presented to the court below for decision in an adversarial context and in a form substantially similar to that in which it is presented to us. The purpose is to allow meaningful consideration of the issue by the trial court. [Citation omitted] 565 P.2d at 853-54.

The court in Lewis also made the following observations:

> [M] ere mention of the issue by the opposing party out of an apparent abundance of caution is not sufficient to meet this requirement. 565 P.2d at 854.

Similarly, McGee submits that the prosecution's mere "mention" of the plain view exception before the trial court, without presenting evidence or argument on the issue, was not sufficient to preserve it for appeal. Indeed, it is evident from a reading of the transcript that the trial court did not believe that it was considering the plain view doctrine [Tr. 570-74].

Other jurisdictions have also foreclosed the prosecution's reliance upon alternative theories on appeal which were not presented to the trial court. Thus, in People v. Superior Court 7 Cal. 3d 186, 198-99, 101 Cal. Reprtr. 837, 496, P.2d 1205,

1214 (1972), the California Supreme Court refused to entertain a theory to justify a warrantless search which was raised for the first time on appeal:

> Furthermore, the People's new theory comes too late; neither at the suppression hearing or the preliminary examination did the People support the search on this rationale. "To permit the People to inject this new theory into the case would deprive the [defendant] of a fair opportunity to present an adequate record in response. The [defendant] was entitled to assume that the justification for the search was presented before the Magistrate. He had no opportunity to mount a legal attack on a theory advanced for the first time before this court, not to present evidence on cross-examination to rebut the factual basis underlying the additional justification for the search [Citations omitted.]

The same principle was espoused by the Oregon Supreme Court in State v. Hickman, 273 Or. 358, 540 P.2d 1406 (1975), where it reversed an appellate court's decision to remand a case to the trial court for findings on whether a warrantless search was consented to by the defendant. The reversal was ordered because the issue of consent was not raised in the trial court:

> Appellate courts are limited in their scope of review. Generally, on appeal, the case, civil or criminal, should be heard on the same theory upon which it was presented in the court below. [Citation omitted] . . . Further, a question not raised and presented in the trial court

> will not be considered on appeal unless upon an examination of the entire record the court can find the error is manifest and that the ends of justice will not otherwise be satisfied. [Citations omitted] Since the State did not rely upon "consent" as a basis to justify the warrantless search at the trial court level or on appeal, the decision of the Court of Appeals is reversed. 273 Or. at 360-61, 540 P.2d at 1407. [Citations omitted.]

The prosecution should therefore be foreclosed from relying upon this alternate theory since it was not presented to, or considered by, the trial court.

B. The Plain View Doctrine Is Inapplicable Under the Facts Of This Case

The prosecution's reliance upon the plain view doctrine is factually unavailing in this case. From a reading of the prosecution's authorities, it appears to be espousing the principle that the police can confiscate any objects which fall within their view. However, the authority of the police to seize objects is subject to well established constitutional proscriptions.

In order to support a seizure, the police must have probable cause to believe that the object is contraband or is evidence of a criminal act. See e.g., McCoy v. State, 491 P.2d 127, 138 (Alaska 1971). The scope of seizure is expanded somewhat when the police conduct a search incident to an arrest, where they are allowed to seize any dangerous weapons which may be on the person of the individual. This latter concept is based upon the principle that police officers may take steps to secure their own safety. Weltin v. State, 574 P.2d 815 (Alaska 1978).

Significantly, at the time of the seizure of the firearm, McGee was not under arrest. Accordingly, the firearm was not taken during the course of a search.